

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

PAT OMAN,	)	
	)	
Plaintiff,	)	Case No. CV05-558-HU
	)	(Lead Case)
vs.	)	
	)	Case No. CV05-1715-HU
PORTLAND PUBLIC SCHOOLS,	)	
Multnomah School District No. 1,	)	
et al.	)	
	)	
Defendants.	)	
<hr/>		OPINION AND
	)	ORDER
PAT OMAN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
PORTLAND PUBLIC SCHOOLS, et al.	)	
	)	
Defendants.	)	
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6  
7 HUBEL, Magistrate Judge:

8 These are consolidated actions brought pursuant to the  
9 Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§  
10 1400-1487. The defendants are Portland Public Schools (PPS) and  
11 individuals employed with PPS (collectively, the PPS defendants);  
12 the Oregon Department of Education (ODE), State Superintendent for  
13 Public Instruction Susan Castillo, and individuals employed by the  
14 ODE (collectively, the state defendants).

15 The matters before the court are the PPS defendants' Motion  
16 for Summary Judgment (doc. # 96), the state defendants' Motion for  
17 Summary Judgment (doc. # 105), plaintiff's Motion for  
18 Reconsideration of Previous Rulings (doc. # 127), state defendants'  
19 Motion to Affirm this Court's Pre-Winkelman Decisions (doc. # 121),  
20 and PPS defendants' Motion to Affirm Prior Decisions in Light of  
21 Winkelman, (doc. # 123).

22 **Standards**

23 I. Summary judgment

24 Summary judgment is appropriate "if the pleadings,  
25 depositions, answers to interrogatories, and admissions on file,  
26 together with the affidavits, if any, show that there is no genuine  
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1 issue as to any material fact and that the moving party is entitled  
2 to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary  
3 judgment is not proper if material factual issues exist for trial.  
4 Warren v. City of Carlsbad, 58 F.3d 439, 441 (9<sup>th</sup> Cir. 1995).

5 A genuine dispute arises "if the evidence is such that a  
6 reasonable jury could return a verdict for the nonmoving party."  
7 State of California v. Campbell, 319 F.3d 1161, 1166 (9<sup>th</sup> Cir.  
8 2003). Credibility determinations, the weighing of the evidence,  
9 and the drawing of legitimate inferences from the facts are  
10 functions of the factfinder, not the judge, when he is ruling on a  
11 motion for summary judgment. Id.

12 On a motion for summary judgment, the court must view the  
13 evidence in the light most favorable to the non-movant and must  
14 draw all reasonable inferences in the non-movant's favor. Clicks  
15 Billiards Inc. v. Sixshooters Inc., 251 F.3d 1252, 1257 (9<sup>th</sup> Cir.  
16 2001). When different ultimate inferences can be reached, summary  
17 judgment is not appropriate. Sankovich v. Life Ins. Co. Of N.  
18 America, 638 F.2d 136, 140 (9<sup>th</sup> Cir. 1981).

19 The criteria of "genuineness" and "materiality" are distinct  
20 requirements. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248  
21 (1986); Nidds v. Schindler Elevator Corp., 113 F.3d 912 (9<sup>th</sup> Cir.  
22 1997). The requirement that an issue be "genuine" relates to the  
23 quantum of evidence the plaintiff must produce to defeat the  
24 defendant's motion for summary judgment. The authenticity of a  
25 dispute is determined by whether there is sufficient evidence that  
26 a reasonable factfinder could return a verdict for the nonmoving  
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1 party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).  
2 "If the evidence is merely colorable, or is not significantly  
3 probative, summary judgment may be granted." Id. at 249-50.

4 The materiality of a fact is determined by the substantive law  
5 on the issue. Anderson, 477 U.S. at 248; T.W. Electrical Service,  
6 Inc. v. Pacific Electrical Contractors Assoc., 809 F.2d 626, 630  
7 (9th Cir. 1987). Only disputes over facts that might affect the  
8 outcome of the suit under the governing law will properly preclude  
9 the entry of summary judgment. Anderson, 477 U.S. at 248.

10 The moving party has the burden of establishing the absence of  
11 a genuine issue of material fact. Celotex Corp. v. Catrett, 477  
12 U.S. 317, 323 (1986). If the moving party shows the absence of a  
13 genuine issue of material fact, the nonmoving party must go beyond  
14 the pleadings and identify facts which show a genuine issue for  
15 trial. Id. at 324. Assuming that there has been sufficient time for  
16 discovery, summary judgment should be entered against a "party who  
17 fails to make a showing sufficient to establish the existence of an  
18 element essential to that party's case, and on which that party  
19 will bear the burden of proof at trial." Id. at 322.

20 II. IDEA claims for judicial review of due process hearings

21 Traditional standards for summary judgment do not apply to the  
22 court's review of IDEA claims based on challenges to a due process  
23 hearing, because the statute permits the court to review any new  
24 evidence along with the administrative record. Capistrano Unified  
25 Sch. Dist. v. Wartenberg, 59 F.3d 884, 892 (9<sup>th</sup> Cir. 1995). The  
26 court must "make an independent judgment based on a preponderance  
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1 of evidence and giving due weight to the hearing officer's  
2 determinations." The court reviews the ALJ's decision applying a  
3 modified de novo standard. Pitchford v. Salem Keizer Sch. Dist.,  
4 155 F. Supp.2d 1213, 1215 (D. Or. 2001). The proper amount of  
5 deference given to the ALJ's decision is a "matter for the  
6 discretion of the courts." Gregory K. v. Longview Sch. Dist., 811  
7 F.2d 1307, 1311 (9<sup>th</sup> Cir. 1987). The hearing officer's decision is  
8 entitled to "substantial weight" if it "evinces his careful,  
9 impartial consideration of all the evidence and demonstrates his  
10 sensitivity to the complexity of the issues presented." Ojai  
11 Unified Sch. Dist. v. Jackson, 4 F.3d 1467, 1476 (9<sup>th</sup> Cir. 1993).

12 The burden of proof in an IDEA case is on the party  
13 challenging the administrative ruling. Clyde K. v. Puyallup Sch.  
14 Dist. No. 3, 35 F.3d 1396, 1398-99 (9<sup>th</sup> Cir. 1994), *superseded by*  
15 *statute on other grounds*, as recognized in M.L. v. Federal Way Sch.  
16 Dist., 341 F.3d 1052 (9<sup>th</sup> Cir. 2003).

### 17 III. IDEA retaliation claims

18 The parties agree that there do not appear to be any published  
19 court cases describing the legal standard governing an IDEA claim  
20 by a parent alleging retaliation by a school district or a state  
21 educational agency. PPS urges the court to apply the familiar  
22 McDonnell Douglas burden-shifting standard used in retaliation  
23 claims brought pursuant to civil rights statutes, such as Title VII  
24 and the Americans with Disabilities Act, prohibiting employers from  
25 retaliating against employees who oppose discriminatory employment  
26 practices. To establish a prima facie case of retaliation under  
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1 this standard, the employee must show that 1) he has engaged in  
2 statutorily protected expression; 2) he has suffered an adverse  
3 employment action; and 3) there is a causal link between the  
4 protected expression and the adverse action. See, e.g., EEOC v.  
5 Dinuba Medical Clinic, 222 F.3d 580, 586 (9<sup>th</sup> Cir. 2000). Under  
6 McDonnell Douglas, if the plaintiff makes out a prima facie case,  
7 the burden of production shifts to the defendant to give a  
8 legitimate nondiscriminatory reason for the adverse action and, if  
9 the defendant does so, the burden returns to the plaintiff to prove  
10 pretext. See, e.g., Coons v. Secretary of the U.S. Dept. of the  
11 Treasury, 383 F.3d 879, 887 (9<sup>th</sup> Cir. 2004).

12 Oman asserts that a more analogous standard is the one  
13 applicable to claims asserting interference with, restraint, or  
14 denial of the exercise or attempted exercise of rights provided  
15 under the Family Medical Leave Act (FMLA), 29 U.S.C. § 2615(a)(1).  
16 Department of Labor regulations interpret "interference" to include  
17 discouraging an employee from exercising his or her rights. 29  
18 C.F.R. § 825.220(b). See also Liu v. Amway Corp., 347 F.3d 1125,  
19 1132 (9<sup>th</sup> Cir. 2003).<sup>1</sup>

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21 <sup>1</sup>The Department of Labor interprets "interference" to  
22 include "not only refusing to authorize FMLA leave, but  
23 discouraging an employee from using such leave." 29 C.F.R. §  
24 825.220(b). In Liu, the court considered the employee's argument  
25 that the employer interfered with her FMLA rights by 1) denying  
26 and mischaracterizing her FMLA leave and 2) using her protected  
27 leave as a factor in its decision to terminate her. The court  
28 noted that DOL regulations clearly state that an employer  
interferes with an employee's rights under FMLA by "refusing to  
authorize FMLA leave" and "discouraging an employee from using  
such leave." Liu at 1134. The court said, "It follows that an  
employer has discouraged an employee from taking FMLA leave when

1 A prima facie case under this statute is essentially the same:  
2 1) engaging in protected activity; 2) an adverse employment action;  
3 and 3) a causal relationship between the adverse action and the  
4 exercise of the protected right. See, e.g., Bachelder v. America  
5 West Airlines, Inc., 259 F.3d 1112, 1125 (9<sup>th</sup> Cir. 2001)(to succeed  
6 on a FMLA interference claim, plaintiff must show by a  
7 preponderance of the evidence that the taking of FMLA protected  
8 leave constituted a negative factor in the decision to terminate or  
9 visit other adverse employment actions upon the plaintiff). But the  
10 Ninth Circuit has expressly rejected the use of the McDonnell  
11 Douglas burden-shifting framework in such claims. Bachelder, 259  
12 F.3d at 1124.

13 I conclude that the McDonnell Douglas burden-shifting standard  
14 is inapplicable to Oman's IDEA retaliation claim, because  
15 employment discrimination claims are asserted in the context of at-  
16 will employment. The evidentiary burdens placed on an employee who  
17 has suffered an adverse employment action are not appropriate in  
18 the context of a plaintiff who asserts, as here, that a public  
19 agency, not her employer, hindered the free exercise of her  
20 statutorily-guaranteed rights. For Oman's retaliation claims, I  
21 adopt the FMLA "interference" standard as articulated in Bachelder.  
22 The issues of whether PPS has proffered a legitimate reason for its  
23 actions, and whether Oman has overcome that showing by proving that  
24 PPS's stated reasons for its actions are pretextual, are not part  
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26 his or her supervisor interferes with the length and dates of  
27 leave, including denying leave outright." Id.

1 of that standard.

2 **PPS Defendants' Motion for Summary Judgment**

3 The four claims that remain in the case against the PPS  
4 defendants are counts 1 and 9 in No. 05-558 and counts 1 and 17 in  
5 No. 05-1715. Some of the allegations encompassed in these claims  
6 are challenges to the findings and conclusions of the hearings  
7 officers (ALJs) in two due process hearings conducted by ODE;  
8 others are allegations of retaliation against Pat Oman by the  
9 defendants.

10 I. Factual and Procedural Background

11 A. DP 04-110

12 On March 16, 2004, Pat Oman filed a request for a due process  
13 hearing. ODE ALJ Betty Smith presided over the eight-day hearing.  
14 ALJ Smith issued findings of fact and conclusions of law in an 84-  
15 page corrected final order dated March 31, 2005.

16 The primary focus of Oman's complaint in DP 04-110 was C.O.'s  
17 April 2002 IEP. In her final order, ALJ Smith rejected Oman's claim  
18 that C.O. had not been provided a free appropriate public education  
19 (FAPE) as required by the IDEA, with some exceptions, for which ALJ  
20 Smith ordered relief.

- 21 1. Placement. ALJ Smith found that C.O.'s April 2002  
22 IEP was properly developed. ALJ Smith upheld PPS's  
23 refusal to place C.O. at a magnet or a vocational  
24 school as requested because these were not  
25 "placements" as defined under the IDEA. Oman had  
26 been advised by PPS that she could apply to  
27



1 transfer C.O. to the magnet or the vocational  
2 school, both of which accepted special ed students,  
3 but C.O., like many other students who apply for  
4 such transfers, was not accepted at either school.  
5 The ALJ found that students, including those  
6 eligible for special education do not have a  
7 "right" to vocational education on demand.

8 2. FAPE. C.O.'s April 2002 IEP offered him a FAPE as  
9 required by the IDEA, and did not contain "vague  
10 and unmeasurable goals."

11 3. Prior written notice. ALJ Smith found that PPS  
12 failed to provide Oman with the required prior  
13 written notice of its rejection of her requests for  
14 keyboarding and handwriting instruction, and of its  
15 rejection of her request for counseling and for a  
16 vocational educational curriculum.

17 4. IEP Implementation. ALJ Smith found that PPS did  
18 not observe C.O.'s progress in communication in the  
19 classroom and did not prove how much math  
20 instruction he received.

21 5. Assessment for Regression and Extended School Year  
22 Services (ESY). PPS adequately assessed C.O. for  
23 regression, but did not provide prior written  
24 notice of the denial of ESY.

25 6. Records Requests. ALJ Smith found that PPS did not  
26 comply with its obligation to provide Oman with all  
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1 of C.O.'s education records in a timely fashion.

2 7. Reimbursement for Independent Educational  
3 Evaluation (IEE). ALJ Smith found that PPS had  
4 offered to reimburse Oman for an IEE she obtained  
5 if the matter remained confidential and if  
6 reimbursement would not be considered a precedent.  
7 Oman rejected the offer, but was reimbursed anyway  
8 about a year after she first requested  
9 reimbursement. ALJ Smith found that a school  
10 district may not require a parent to access his or  
11 her insurance to pay for an IEE, but that it is not  
12 impermissible for a school district to ask the  
13 parent to do so. ALJ Smith found that PPS's policy  
14 requiring the parent to pay in advance was not a  
15 violation of the IDEA.

16 8. CIM/CAM Academy. ALJ Smith found that there was no  
17 decision not to place C.O. in the CIM/CAM Academy  
18 in summer 2002 as Oman alleged; Oman failed to  
19 submit an application to have C.O. attend the  
20 academy and did not ask the IEP team to include the  
21 academy in C.O.'s IEP.

22 9. Three Year Evaluation. ALJ Smith found PPS's  
23 evaluation was adequate.

24 ALJ Smith ordered some remedial relief against PPS:

25 1. By June 10, 2005, PPS was required to provide  
26 training to its staff on prior written notice  
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1 requirements, how to respond to records requests,  
2 and what must be done if staff concluded a change  
3 in an IEP might be necessary to ensure provision of  
4 a FAPE.

5 2. PPS was required to "offer C.O. 4,000 minutes of  
6 compensatory education in math, to be provided in  
7 the summer of 2005 or, if the parents and the  
8 District agree, at another time."

9 On November 4, 2005, ODE determined that PPS had met its  
10 obligations under ALJ Smith's order, stating that PPS had submitted  
11 documentation that it had conducted the required training. ODE  
12 found that although C.O. had not received the 4,000 minutes of  
13 compensatory math education, PPS had complied with ALJ Smith's  
14 order by *offering* the compensatory services.

15 The District offered compensatory education services in  
16 accordance with the final order. The District reasonably  
17 tried to accommodate the parent's preferences regarding  
18 scheduling these services during the summer of 2005, and  
19 made a reasonable offer to provide the services beginning  
no later than October 15, 2005. The parent did not accept  
these offers. The Department concludes that the District  
has satisfied the requirement to offer compensatory  
education services in math.

20 The finding by ODE that PPS had met its obligations under ALJ  
21 Smith's order by "offering" the compensatory math education no  
22 later than October 15, 2005, but never actually providing it, is  
23 one of the acts Oman alleges to be retaliatory.

24 B. DP 05-106

25 On April 5, 2005, Oman filed another request for a due process  
26 hearing, based on C.O.'s 2003 IEP. ALJ Bernadette House was  
27

1 assigned to the case. The hearing lasted four days. After the  
 2 hearing, ALJ House issued findings of fact and conclusions of law  
 3 in a 27-page corrected final order.

4 In her final order, ALJ House concluded that PPS had met its  
 5 obligations to C.O., including prior written notice as required,  
 6 and providing C.O. with a FAPE. Although ALJ House found that PPS  
 7 had failed to provide Oman access to all of C.O.'s records, she  
 8 determined that the failure to provide access "did not prevent  
 9 Parent from participating in the development of the April 17, 2003  
 10 IEP." The reason for this finding was that Oman had reviewed the  
 11 records before the IEP meetings. No remedies were ordered.

12 C. DP 05-116

13 By letter dated June 28, 2005, Oman filed a third request for  
 14 a due process hearing.<sup>2</sup> ODE received the request, according to its  
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16 <sup>2</sup> The letter set out five issues for resolution. The first  
 17 was based on IDEA, and was stated as follows:

18 Whether the District's progress reports from March 2001  
 19 to June 2004 did not accurately inform the parents of  
 20 the extent to which C.O.'s progress was insufficient to  
 21 enable C.O. to achieve his goals by the end of each  
 22 school year, because the progress reports were  
 23 incomplete, misleading, or not done at all; and whether  
 24 this allege failure to provide accurate progress  
 25 reports prevented the parents from meaningful  
 26 involvement in the IEP development process.

27 The second was based on Section 504 of the Rehabilitation Act and  
 28 the issue was stated as follows:

Whether PPS subjected C.O. to an abusive environment  
 during the time of C.O.'s enrollment in Fernwood Middle  
 School, from September 1999 to June 2002, by allowing  
 other students to insult him; and whether his placement  
 at Grant High School, among the same students, was  
 appropriate and constituted placement in a least  
 restrictive environment.

The third issue was based on IDEA and is stated as follows:

1 date stamp, on July 5, 2005. The 2004 Amendments to the IDEA (IDEIA  
2 2004) had imposed on parents requesting a due process hearing the  
3 requirement that they provide a description of the nature of the  
4 problem, the facts relating to the alleged problem or problems, and  
5 a proposed resolution of the problem. IDEIA 2004 was passed in  
6 December 2004, and took effect on July 1, 2005. However, federal  
7 rules implementing IDEIA 2004 were not adopted until October 13,  
8 2006, and Oregon did not file state administrative rules  
9 implementing IDEIA until April 25, 2007.

10 After Oman requested the due process hearing, PPS filed a  
11 motion asking ODE to determine whether her request for a due  
12 process hearing met the IDEIA 2004 criteria for a due process  
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14 Whether the District's failure to respond to parental  
15 requests for information, evaluations, IEP meetings,  
16 and services, from 1997 to the present, prevented the  
parent from meaningful involvement in the IEP  
development process.

17 The fourth issue was based on IDEA and is stated as follows:

18 Whether the District should reimburse the parents for  
educational services and experiences privately obtained  
19 from July 2003 through June 2004.

The fifth issue was based on IDEA and Section 504 and is stated  
20 as follows:

21 Whether the District's alleged failure to assess C.O.  
in all areas related to the suspected disability, from  
22 1996 to the present, resulted in a denial of FAPE; and  
whether the District's failure to provide an  
23 individualized education program for the school years  
1996-1997, 1997-98, and 1998-1999 was also a denial of  
FAPE.

24 Oman ended her letter as follows:

25 If you determine that the above issues are time-barred,  
fail to state a claim, have already been adjudicated,  
26 or are outside the purview of your authority to conduct  
an administrative due process hearing, please let me  
27 know by writing to me at the address below.

1 notice. IDEIA 2004 was not yet in effect as of the date of Oman's  
2 letter requesting the hearing, and had been effect for only five  
3 days on the date ODE received the letter. ALJ Dee Anna Hassanpour  
4 decided the motion in PPS's favor on July 20, 2005. ALJ Hassanpour  
5 dismissed the due process complaint notice on the ground of  
6 insufficiency. ALJ Hassanpour found that the description of the  
7 nature of the problem in the third issue was adequate, but that the  
8 facts as presented in Issue 3 were "overly broad and do not contain  
9 enough specific enough [sic] information to allow the District to  
10 adequately prepare for hearing." ALJ Hassanpour noted that the time  
11 span alleged was nearly eight years and that Oman had failed to  
12 provide relevant dates.

13 With respect to Issue 4, Hassanpour found that Oman had failed  
14 to give an adequate description of the problem or of the facts  
15 related to the problem. She noted that the "issue does not contain  
16 a problem, much less a description of the nature of the problem. It  
17 merely states a question..." Id. at p. 3. ALJ Hassanpour found  
18 further that the due process request also failed to provide facts  
19 specific enough to allow PPS adequately to prepare for hearing, as  
20 the time period covered almost four years, failed to specify what  
21 educational services should be reimbursed, and failed to specify  
22 what educational experiences should be reimbursed. Id.

23 As for Issue 5, ALJ Hassanpour found that the nature of the  
24 problem was adequately described, but that the facts were not,  
25 because the time span was nearly nine years and the complaint  
26 failed to specify the type of "suspected disability" at issue.

1 In conclusion, Hassanpour wrote that

2 [T]he parent of C.O. may file an amended notice only with  
 3 the written consent of the District and allow the  
 4 District the opportunity to resolve the amended complaint  
 5 through the resolution process set forth in Sec.  
 615(f)(1))(B)[of the 2004 IDEIA]; or the parent of C.O.  
 may petition the undersigned administrative law judge for  
 permission to amend this complaint.

6 Id. at p. 4. Oman testified at her deposition that she did not  
 7 attempt to file an amended complaint. Although PPS and ODE use this  
 8 conduct against her in their arguments that she failed to exhaust  
 9 her claims administratively, the record contains factual issues  
 10 about whether Oman ever received any guidance from ODE on how to go  
 11 about filing an amended due process request, and in fact whether  
 12 ODE made it unusually difficult for Oman to obtain necessary  
 13 information.

14 D. DP 106-116.

15 On June 2, 2006, Oman again attempted a request for a due  
 16 process hearing.<sup>3</sup> Again PPS moved against the notice for lack of

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17 <sup>3</sup> Her letter posed the following issues:

- 18 1. Whether the IEP written for C.O. in June 2004 failed to
- 19 provide a free and appropriate education because the
- 20 parents were prevented from meaningful involvement in
- 21 the IEP process.
- 22 2. Whether the June 2004 IEP was adequate, addressed
- 23 C.O.'s needs, and whether what was written into the IEP
- 24 was implemented.
- 25 3. Whether the progress reports done from June 2004 to
- 26 June 2005 were inaccurate, misleading, or not done at
- 27 all.
- 28 4. Whether PPS failed to provide adequate prior written
- notice of refusals for services, accommodations,
- training, and objectives requested by the parent and by
- his attorney during the development of the 2004 IEP.
5. Whether PPS should reimburse the parents for
- educational services privately provided from June 2004
- to June 2005.

1 sufficiency under IDEIA 2004, and again an ODE ALJ, David  
2 Gerstenfeld, decided the motion in PPS's favor. The ruling was  
3 similar to that of ALJ Hassanpour. Oman did not attempt to file an  
4 amended complaint.

5 II. Claim 1, Case No. 05-558

6 For this claim, Oman alleges that the PPS defendants violated  
7 her rights under the IDEA by denying her 1) the right to  
8 participate meaningfully in the development of her child's IEP, 2)  
9 the right to be free of coercive preconditions for IEE  
10 reimbursement, and 3) the right to an administrative due process  
11 hearing. Second Amended Complaint ¶ 31. PPS and Oman agree that the  
12 issues one and two of this claim were addressed in the  
13 determinations of the ALJs in DP 04-110 and DP 05-106. The court  
14 must therefore decide whether to affirm the rulings of the ALJs.

15 Oman has submitted no evidence to support her assertions that  
16 the ALJs' determinations on these two issues were incorrect. She  
17 has submitted a declaration, but the declaration does not contain  
18 any statements of fact sufficient to provide an evidentiary basis  
19 for reversing the rulings of the ALJs.

20 There is no evidence to support a claim that ALJ Smith erred  
21 with respect to whether Oman was given the right to "participate  
22 meaningfully" in C.O.'s 2002 IEP. ALJ Smith found that PPS had  
23 failed to provide Oman the required written notice that it was  
24 rejecting her requests for keyboarding and handwriting instruction,  
25 counseling, a vocational educational curriculum, and an extended

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1 school year; the ALJ found further that PPS had failed to provide  
2 Oman with all her child's educational records in a timely fashion.  
3 ALJ Smith ordered relief in the form of requiring PPS to provide  
4 its employees with additional training on the provision of records  
5 and notices to parents. Oman has not made a showing that ALJ  
6 Smith's findings and the relief ordered were incorrect or  
7 inadequate.

8 In DP 05-106, ALJ House found that PPS had provided Oman with  
9 adequate prior written notice, and that although PPS had failed to  
10 provide Oman access to all of C.O.'s records, the failure did not  
11 prevent Oman from participating in the April 17, 2003 IEP because  
12 Oman reviewed the records before the IEP meetings. Oman has not  
13 made a showing that ALJ House's findings were incorrect.

14 The record establishes that Oman was reimbursed for the IEE,  
15 without a confidentiality condition. ALJ Smith held, in DP 04-110,  
16 that PPS was not permitted to require a parent to submit a claim  
17 for an IEE to the parent's insurer. There is no evidence in the  
18 record that PPS did so. I find no basis in the record for  
19 overruling the ALJ. PPS is entitled to summary judgment on the  
20 first two parts of Claim 1 in No. 05-558.

21 With respect to the third issue, the denial of Oman's right to  
22 a due process hearing, PPS argues that the claim has not been  
23 exhausted, so that the court does not have jurisdiction over it.  
24 PPS argues further that, even if exhaustion did not apply to this  
25 claim, there is no evidence that any PPS defendant denied Oman a  
26 right to a due process hearing. I agree with the latter argument.

1 As the adverse party in the due process hearings, it was not within  
2 PPS's power to deny Oman her right to a due process hearing; this  
3 could only be done by ODE. The question of whether ODE properly  
4 dismissed Oman's due process requests in DP 05-116 and DP 06-116  
5 will be taken up in the discussion of the ODE defendants' motion  
6 for summary judgment. The PPS defendants are entitled to summary  
7 judgment on the third part of Claim 1 in No. 05-558.

8 I conclude that PPS is entitled to summary judgment in its  
9 favor on Claim 1 of No. 05-558.

10 III. Claim 9, Case No. 05-558.

11 This is an IDEA retaliation claim. For that claim, Oman  
12 alleges that as a result of her "frequent complaints," she  
13 "incurred the personal animosity" of the PPS defendants. Complaint  
14 ¶ 59. She alleges further that in retaliation for her complaints,  
15 the PPS defendants "knowingly and individually prevented  
16 plaintiff's access to ... fair and impartial administrative due  
17 process hearings, unreasonably delayed reimbursement for an IEE,  
18 accessed the Plaintiff's insurance without prior authorization, and  
19 denied access to educational records." Id. at ¶ 60.

20 PPS moves against this claim on the basis of failure to  
21 exhaust, citing a First Circuit case, Weber v. Cranston School  
22 Committee, 212 F.3d 41, 51 (1<sup>st</sup> Cir. 2000), which in turn quotes 20  
23 U.S.C. § 1415(b)(6)(IDEA complaint provision extends to "any matter  
24 relating to the identification, evaluation, or educational  
25 placement of the child, or the provision of a free appropriate  
26 public education to such child."). PPS argues that because Oman did  
27

1 not raise the retaliation claim in the due process hearing, she is  
2 barred from raising it here.

3 According to Oman's declaration, on the first day of the  
4 hearing in DP 05-106, there was "extensive discussion" of a motion  
5 made by her to "add several issues to be considered, including the  
6 question of PPS retaliation." Oman Declaration ¶ 8. The motion was  
7 unopposed by PPS, although according to Oman, PPS counsel said that  
8 "by not filing a specific response to the rather extensive motion  
9 to expand the issues, I certainly wasn't conceding that they were  
10 appropriate." Id. According to Oman, "At no time during the  
11 administrative proceedings for DP 05-106 did PPS argue that they  
12 wanted to have this issue addressed in the due process hearing. The  
13 motion was denied by ALJ House because it was "untimely." Id.

14 This testimony creates a fact issue on whether Oman attempted  
15 to exhaust the retaliation issue in DP 05-106, only to have her  
16 motion denied by ALJ House. PPS's motion for summary judgment on  
17 the basis of Oman's failure to exhaust this claim is denied.

18 Oman's retaliation allegations are that PPS 1) "knowingly ...  
19 prevented plaintiff's access to ... fair and impartial  
20 administrative due process hearings, 2) unreasonably delayed  
21 reimbursement for an IEE, 3) accessed the Plaintiff's insurance  
22 without prior authorization, and 4) denied access to educational  
23 records." The second and third allegations, dealing with the IEE,  
24 do not support a retaliation claim. The circumstances surrounding  
25 the IEE were considered by ALJ Smith in DP 04-110. According to ALJ  
26 Smith's findings, Oman was ultimately reimbursed by PPS for the

1 IEE, despite Oman's refusal to enter into a confidentiality  
2 agreement, about a year after requesting the payment. ALJ Smith  
3 found that PPS's policy requiring the parent to pay for an IEE in  
4 advance was not a violation of the IDEA. Oman acknowledged at oral  
5 argument that PPS did not access her insurance to pay for the IEE.  
6 On the record before me, I am unable to determine whether a one  
7 year delay in reimbursement is unreasonable; the record does show  
8 that Oman was reimbursed, without having to comply with "coercive  
9 preconditions" such as entering into a confidentiality agreement or  
10 allowing PPS access to her health insurance.

11 But Oman's allegations that PPS retaliated against her by  
12 preventing Oman's access to "fair and impartial" due process  
13 hearings, and denying her access to educational records are  
14 sufficient to support a retaliation claim.

15 In the context of a retaliation case against an employer, an  
16 adverse action extends beyond workplace-related or employment-  
17 related conduct, and includes acts that "might have dissuaded a  
18 reasonable worker from making or supporting a charge of  
19 discrimination." Burlington Northern & Santa Fe Railway Co. v.  
20 White, \_\_ U.S. \_\_, 126 S.Ct. 2405, 2412-13 (2006). See also Ray v.  
21 Henderson, 217 F.3d 1234, 1243 (9<sup>th</sup> Cir. 2000)(employment action is  
22 adverse in retaliation claim if it is "reasonably likely to deter  
23 employees from engaging in protected activity.") Although the case  
24 at bar is not a retaliation claim against an employer, the court  
25 adopts the standard defining adverse action as conduct that might  
26 dissuade a reasonable person from engaging in protected activity.

1 Such conduct, under the broad statutory and regulatory  
2 interpretations of FMLA, would include not only acts that could  
3 reasonably deter a person from exercising her rights, but also acts  
4 that impede the exercise of those rights, such as procedural  
5 obstacles. I consider, therefore, whether Oman has demonstrated  
6 that PPS engaged in conduct that might have dissuaded, deterred or  
7 impeded a reasonable person from pursuing her rights under the  
8 IDEA.

9 Oman has alleged that Constance Bull, PPS's counsel, told her,  
10 prior to the first due process hearing, DP 04-110, that she was not  
11 allowed to contact C.O.'s teachers or staff about the due process  
12 hearing or the complaint. LeClair Declaration, Exhibit 1 Oman dep.  
13 115: 12-15, 121:6-21. PPS does not deny this allegation, arguing  
14 only that Oman testified she understood the restriction to apply  
15 "only to matters relating to the hearing," not to C.O.'s current  
16 schooling. PPS Reply Memorandum, p. 13.

17 It is immaterial whether Oman understood Bull's prohibition on  
18 her contacting PPS teachers or staff to apply to Oman's complaints  
19 about C.O.'s IEP and the issues raised in the due process hearing  
20 of 2004 rather than any "current" educational issues. PPS has not  
21 cited the court to any provision of the IDEA which permits school  
22 district attorneys to prohibit parents from contacting or speaking  
23 to district witnesses in preparation for a due process hearing. A  
24 reasonable factfinder could conclude that Bull's prohibition on  
25 Oman's contacting any PPS teachers or staff could reasonably have  
26 ///

1 deterred and impeded Oman from advocating for her son at the due  
2 process hearing.

3 Oman alleges that PPS created difficulties for her in getting  
4 access to C.O.'s educational records before the 2004 due process  
5 hearing. LeClair Declaration, Exhibit 1 (Oman dep.)125:1-11. PPS  
6 asserts that it is entitled to summary judgment on this claim  
7 because "that issue was addressed in a thorough fashion by the  
8 administrative process already." Indeed it was. In DP 04-110, ALJ  
9 Smith found that PPS had failed to timely provide Oman with her  
10 son's complete educational records. In a subsequent due process  
11 hearing, DP 05-106, ALJ House found that PPS had again failed to  
12 provide Oman access to all of C.O.'s records. PPS has not  
13 articulated any reason the court should not affirm these findings  
14 by ALJs Smith and House. It is therefore factually undisputed that  
15 PPS failed to give Oman timely access to her son's complete  
16 educational records. Although PPS argues that the failure to  
17 provide records was the result of "miscommunication," a reasonable  
18 factfinder could conclude that PPS's failure to provide Oman with  
19 C.O.'s complete educational records before the due process hearings  
20 in 2004 and 2005 reasonably deterred and impeded Oman from pursuing  
21 her own and her son's IDEA rights. The inference is strengthened by  
22 Bull's prohibition on Oman's contacting any PPS witnesses before  
23 the 2004 due process hearing.

24 PPS argues that none of this conduct is causally connected to  
25 any protected activity. I disagree. Constance Bull, an attorney  
26 who represented PPS at the 2004 due process hearing, directly  
27

1 prohibited Oman from contacting PPS witnesses before the 2004 due  
2 process hearing. The causal connection between the protected  
3 activity (Oman's pursuit of due process rights under the IDEA), and  
4 PPS's preventing Oman access to her child's teachers, staff, and  
5 educational records, is supported by both temporal proximity and  
6 cause and effect, the subject matter of the prohibitions relating  
7 directly to the topics to be resolved at the due process hearing.  
8 This conduct, if true, could be found to deter and impede a  
9 reasonable person from pursuing activity protected under the IDEA.

10 PPS is not entitled to summary judgment on the retaliation  
11 claim.

12 III. Claim 1, Case No. 05-1715

13 For this claim, Oman alleges that the PPS defendants violated  
14 her rights under the IDEA by denying her "the right to participate  
15 meaningfully in the development of her child's IEP and the right to  
16 an administrative due process hearing." Complaint ¶ 68. According  
17 to PPS, Oman testified at her deposition that the two issues in  
18 this claim relate to C.O.'s 2004 and 2005 IEPs, issues she  
19 attempted to raise in her two unsuccessful requests for due process  
20 hearings. LeClair Declaration, Exhibit 2, Oman dep. 63:7-20. PPS  
21 argues that these claims remain unexhausted because Oman did not  
22 seek to amend her complaints.

23 PPS's argument that these claims should be dismissed because  
24 they are unexhausted is without merit. State defendant Suzy Harris  
25 testified in an affidavit that ODE issued a revised procedural  
26  
27

1 safeguards notice<sup>4</sup> in July 2005 based on IDEIA 2004. Harris  
2 Affidavit ¶ 9. Harris does not specify what date in July the  
3 revised Notice was issued, but in any event, Oman would not have  
4 had the benefit of this revised Notice on June 28, 2005, when she  
5 wrote her due process hearing request in DP 05-116.

6 The due process request in that case was dismissed by the ALJ  
7 on July 20, 2005. Oman has proffered an e-mail she wrote to Harris  
8 on July 20, 2005, copied to Valerie Miller and Andrew Logerwell,  
9 who was at that time representing the state defendants in this  
10 case. Oman wrote:

11 This is a request for public records. Per the amended  
12 IDEA, 20 USC 1415(a), you have established procedures (in  
13 accordance with the provisions of IDEIA) to guarantee  
14 procedural safeguards for children with disabilities and  
15 their parents. Please send me a copy of those procedures.  
16 I am not interested in the OLD procedures, which I  
already have, but in the new ones that implement the  
provisions of IDEIA. Please forward this request to  
whoever in your agency is responsible for responding to  
public records requests if you are not the correct people  
to be addressing this to.

17 Oman Declaration, Exhibit 1. The IDEA requires that procedural  
18 safeguards notices are to be given to the parents "upon request."  
19 20 U.S.C. § 1415(d)(1)(A)(iii). In response to her request, Oman  
20 received an e-mail from Logerwell, as follows:

21 Now that there is a lawsuit pending, the most productive  
22 way to get documents is through a request for production.  
Under normal circumstances, if you were an attorney you

---

23  
24 <sup>4</sup> Under the IDEA, a procedural safeguards notice  
25 must include a full explanation of procedural safeguards,  
26 written in an "easily understandable manner," "under  
27 regulations promulgated by the Secretary" relating to,  
among other things, the opportunity to present and  
resolve complaints and due process hearings. 20 U.S.C. §  
1415)(d)(2).



1 would not be allowed to contact a represented party  
2 directly during the litigation. Since you are requesting  
3 documents for use in this litigation it would make me a  
lot more comfortable if you would go through me via a  
request for production. ...

4 Oman Declaration, Exhibit 1. ODE's refusal to provide Oman with a  
5 procedural safeguards notice except by means of a request for  
6 production violated the plain terms of the IDEA.

7 According to Harris's affidavit, the ODE issued another  
8 revised procedural safeguards notice in October 2006, based on the  
9 federal regulations that became effective October 2006, along with  
10 a sample Procedural Safeguards Notice from the U.S. Department of  
11 Education. Id. at ¶ 9.<sup>5</sup> Although Harris states that the "procedural  
12 Safeguards Notice is provided to each parent of a child with  
13 disabilities under the IDEA at least once a year and upon filing of  
14 a due process hearing or complaint,"<sup>6</sup> there is no evidence that  
15 Oman ever got one when she filed her due process requests in 2005  
16 and 2006; in fact, the evidence suggests otherwise, since Oman's  
17 2005 request to Harris was forwarded by Harris to Logerwell.

18 ///

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20 <sup>5</sup> The IDEA requires that notices of procedural safeguards  
21 include explanations of procedural safeguards under regulations  
22 promulgated by the Secretary. 20 U.S.C. § 1415(d)(2). It is  
23 doubtful, therefore, that the ODE's July 2005 notice of  
24 procedural safeguards, purporting to conform to IDEIA 2004 but  
provided by ODE before October 2006, when the federal regulations  
for IDEIA 2004 were promulgated, was in compliance with the IDEA.

25 <sup>6</sup> Under the IDEA, the state educational agency is required  
26 to provide procedural safeguards notices to parents once a year,  
27 and upon initial referral or parental request for evaluation, and  
upon the first occurrence of the filing of a complaint, and upon  
request by a parent. 20 U.S.C. § 1415(d)(1)(A).

1 I find Logerwell's characterization of Oman's request for  
2 ODE's Procedural Notice of Procedural Safeguards as "documents for  
3 use in this litigation" dubious. A more accurate characterization  
4 is that Oman was requesting documents which the ODE was statutorily  
5 required to provide her, on request, for use in administratively  
6 pursuing a due process hearing. I therefore decline to penalize  
7 Oman for ultimately abandoning her effort to learn what was  
8 procedurally required in order to request due process hearings in  
9 2005 and 2006.

10 Alternatively, the PPS defendants argue that this claim should  
11 fall on summary judgment because the claims are "unsupported." They  
12 argue that there are benign explanations for Oman's factual  
13 allegations in support of her claim that she was denied the right  
14 to participate meaningfully in the development of C.O.'s 2004 and  
15 2005 IEPs.

16 Oman's first allegation is that she was told by Constance Bull  
17 to put her "concerns or complaints" in writing at C.O.'s April 2005  
18 IEP. LeClair Exhibit 2, Oman dep. 63:19-64:5, 64:9-65-65:7. Bull  
19 has testified that she has asked parents other than Oman to submit  
20 written lists of formal IEP requests. LeClair Declaration, Exhibit  
21 3, Bull dep. 63:19-64:5. Although Oman has alleged that Bull  
22 insinuated this requirement was directed solely at her, Complaint,  
23 No. 05-1715 ¶ 22, Oman has proffered no evidence from which the  
24 court could discern how Bull's request for written documentation  
25 denied Oman meaningful participation in the IEP.

26 Oman has testified that she wrote letters to C.O.'s IEP team  
27

1 containing written comments and questions about C.O.'s April 2005  
2 IEP, that were not answered. LeClair Declaration, Exhibit 2, Oman  
3 dep. 65:2-7, 66:17-23. Oman identified these as letters dated May  
4 23, May 26, June 12, September 15, and October 17, 2005. Id. These  
5 letters are attached to the Bull Declaration as Exhibits 4, 5 and  
6 6.

7 PPS does not deny that it failed to respond to Oman's letters.  
8 PPS argues, however, that Oman has not explained why PPS was  
9 legally obligated to answer every question posed in a letter or why  
10 PPS's alleged failure to answer some of them prevented her  
11 meaningful involvement in C.O.'s 2005 IEP.

12 The May 26, 2005 letter has attachments, including C.O.'s test  
13 scores from Sylvan Learning Center and articles on educating  
14 children with dyslexia. The October 17, 2005 letter contains a  
15 questionnaire with many rhetorical questions. ("Would most or many  
16 students in your class benefit from having their own laptops  
17 available for schoolwork?" "In your professional opinion, is a  
18 student better off with a computer at home, or without one?" "In  
19 your professional opinion are the samples [of C.O.'s writing  
20 ability provided at IEP meetings] representative of the average 11<sup>th</sup>  
21 grader's writing ability?" "Do [C.O.'s] low scores and slow  
22 progress mean that he does not have the ability to learn math as  
23 well as other students?" "C.O. went from a 5<sup>th</sup> grade level of  
24 understanding of math concepts and application, to an 11<sup>th</sup> grade  
25 level of understanding math concepts and application, as measured  
26 by the California Achievement Test, after 36 hours of  
27

1 individualized instruction at Sylvan Learning Center ... Does this  
2 rapid progress indicate that this type of individualized math  
3 instruction is appropriate for C.O.?" )

4 PPS asserts that it offered to meet with Oman on a number of  
5 occasions to discuss concerns or questions, but she refused. Bull  
6 Declaration ¶ 9. Bull states, moreover, that the October 17 letter,  
7 for example, asked the respondent to assume "facts" that were "very  
8 much disputed," related to issues already addressed in the  
9 administrative due process hearings Oman had requested, or were  
10 unrelated to PPS's provision of a FAPE to C.O.

11 The evidence does not support Oman's assertion that PPS's  
12 failure to respond to the questions, arguments, and articles  
13 contained in these letters prevented her meaningful involvement in  
14 C.O.'s 2005 IEP.

15 Oman's third allegation in support of her claim that she was  
16 denied meaningful participation in C.O.'s 2004 and 2005 IEPs is  
17 that 2004 IEP meeting was "dominated by the lawyers." LeClair  
18 Exhibit 2, Oman dep. 72:5-13. The deposition testimony shows that  
19 the lawyers included Dana Taylor, who represented Oman and C.O.,  
20 during C.O.'s 2004 IEP, and Constance Bull, representing PPS at the  
21 2005 and 2006 IEPs. I agree that Oman has not demonstrated how the  
22 presence of lawyers prevented her meaningful participation in the  
23 IEP.

24 For the reasons already discussed, PPS, as an adverse party,  
25 could not deny Oman the right to an administrative due process  
26 hearing.

1 PPS is entitled to summary judgment on claim one.

2 IV. Claim 17, Case No. 05-1517

3 This is also an IDEA retaliation claim, in which Oman alleges  
4 that in retaliation for her activist role and public criticism of  
5 PPS and ODE, the PPS defendants prevented her meaningful  
6 involvement in C.O.'s IEP and prevented her access to  
7 administrative due process hearings.

8 PPS moves against this claim for failure to exhaust  
9 administrative remedies. For the reasons stated, the exhaustion  
10 argument is rejected.

11 PPS also moves against this claim on the merits, arguing that  
12 this IDEA retaliation claim is similar to that in No. 05-558 except  
13 that Oman has additional evidence she would offer to support her  
14 allegations. Oman described this evidence as follows: 1) she did  
15 not receive a response to her October 17, 2005 letter to PPS; 2)  
16 she had communication problems with PPS; 3) Bull attended C.O.'s  
17 IEP meetings after Oman filed the due process complaint and  
18 dominated the meetings; 4) Oman was not given records she  
19 requested; 5) Oman did not receive adequate notices between May and  
20 October 2005; and 6) C.O. did not receive his 4,000 minutes of  
21 compensatory math education ordered by ALJ Smith.

22 Allegations 1-3 do not support a retaliation claim, for  
23 reasons already discussed.

24 The fourth allegation, assuming that it differs from the  
25 allegation of failure to provide records in No. 05-558, is  
26 unsupported by evidence indicating what records PPS failed to

1 provide, or whether Oman was provided the records belatedly or not  
2 at all. In her declaration, Oman states,

3 Plaintiff has addressed ... a multitude of communication  
4 problems that stemmed from the attempts of the parent to  
5 get information and the refusal of PPS to respond to  
6 those attempts. Plaintiff disagrees with the PPS that  
7 this is not an adverse action, particularly in light of  
8 the fact ... that the parent had been told she had to  
9 provide her input in writing, but then when the parent  
10 asked for PPS responses in writing, she didn't get any.

11 Oman Declaration attached to Response to PPS Defendants Motion for  
12 Summary Judgment, p. 32. The allegation is insufficient to support  
13 a retaliation claim.

14 Oman has proffered examples of PPS's 2005 written notices  
15 rejecting her requests for C.O.'s IEP, including a keyboarding  
16 goal; a goal in which C.O. would improve his math skills by four  
17 grade levels, with PPS to pay for instruction at Sylvan Learning  
18 Center if that goal was not met; a request for C.O. to be sent to  
19 the Sylvan Learning Center to receive specially designated  
20 instruction in math; a request that C.O. be provided a tape  
21 recorder, computer and calculator; and a request for a writing goal  
22 that would bring C.O. to 9<sup>th</sup> grade level as measured by the Woodcock  
23 Johnson test and improve his overall writing skills by four grade  
24 levels, as measured by the California Achievement Test, with C.O.  
25 to be sent at PPS expense to Sylvan Learning Center if these goals  
26 were not met. Oman Declaration, Exhibit 3. Oman contended at oral  
27 argument that these notices were inadequate because they did not  
28 define the "basis of the decision."

Each of the written notices proffered by Oman contains  
sections designated as follows:

1       1.    "This action is proposed because." This caption is  
2       followed by a description of Oman's proposal.

3       2.    "This action is based on the following evaluation  
4       procedures, tests, records or reports." This caption is  
5       followed by an explanation of why the IEP team members  
6       believe that the requested goal is not reasonable as an  
7       annual goal and the alternative proposed by the IEP team.  
8       Each notice states that the action is based on "team  
9       discussion and review of records."

10      3.    "We rejected these options because:" This caption is  
11      followed by PPS's reason for rejecting the proposal.

12      Under the IDEA, written notices must include 1) a description  
13 of the action proposed or refused; 2) an explanation of why the  
14 district proposes or refuses to take the action and a description  
15 of *each evaluation procedure, assessment, record or report* the  
16 agency used as a basis for the proposed or refused action; 3) a  
17 statement that the parents of a child with a disability have  
18 protection under the procedural safeguards of the IDEA and the  
19 means by which a copy of a description of the procedural safeguards  
20 can be obtained; 4) sources for parents to contact to obtain  
21 assistance in understanding the provisions of the IDEA; 5) a  
22 description of other options considered by the IEP team and the  
23 reason why these options were rejected; and 6) a description of the  
24 factors that are relevant to the agency's proposal or refusal. 20  
25 U.S.C. § 1415(c)(1)(A)-(F)(emphasis added). See also 34 C.F.R. §  
26 300.503(b).

1 The notices proffered by Oman do not comply with all the  
2 provisions of the IDEA, particularly the requirement that the  
3 district describe *each* evaluation procedure, assessment, record or  
4 report used as the basis for the refusal. However, despite the fact  
5 that the notices are not in full compliance with the IDEA, they do  
6 not provide evidentiary support for a retaliation claim, because,  
7 standing alone, the deficiencies in the notices are not sufficient  
8 for a reasonable factfinder to conclude that because of them, Oman  
9 was reasonably deterred from pursuing protected activity under the  
10 IDEA.

11 Oman's fifth allegation is sufficient to support a retaliation  
12 claim. According to a letter dated September 15, 2005, from Oman to  
13 Laretta Manning, speech pathology administrator for PPS and  
14 apparently leader of the IEP team, Oman

15 tried to get [C.O.] in for tutoring at the Melvin-Smith  
16 Learning Center over the summer, to satisfy the  
17 requirement for compensatory education that was ordered  
18 in a due process hearing, but that they had nothing  
19 available. They book up very early in the summer and by  
20 the time I was able to figure out [C.O.'s] summer  
21 schedule (a delay occasioned by work issues) they had no  
22 time left to work with him. I am still interested in  
23 having him get some tutoring through that organization  
(which is, incidentally, a nonprofit) and the folks at  
Melvin-Smith suggested that this could most easily be  
accomplished during the fall or winter, as their schedule  
is much more open during the times that school is in  
session. I would also consider having him there next  
summer. Does the school district have any objection to  
either of these options? If you are not the right person  
to ask, please forward this letter to whoever is.

24 If I don't hear back from you by September 20, I'll  
25 assume that no reply will be forthcoming.

26 Oman Declaration, Exhibit 1.



1 Copies of the letter were sent to Bull and Harris. There is no  
2 indication in the record whether Oman ever received a response to  
3 this letter from the recipient or from those who received copies.  
4 Oman states in her declaration that "no representative of the PPS  
5 ever answered these questions." Oman Declaration ¶ 1.

6 Nothing in the record explains why PPS told Oman the math  
7 instruction had to be obtained no later than October 15, 2005; the  
8 ALJ did not set this deadline, having only ruled that the  
9 compensatory education was to be provided by the summer of 2005  
10 "or, if the parents and the District agree, at another time." The  
11 record does not reveal what efforts, if any, PPS made to provide  
12 C.O. with that compensatory math education during the summer of  
13 2005 or at any other time. The only evidence in the record is the  
14 September 15 letter from Oman to Manning, which suggests that all  
15 the efforts to obtain the compensatory instruction for C.O. were  
16 being made by Oman.

17 PPS proffers a letter dated November 4, 2005, addressed to  
18 Mary Mertz, Special Education Director for PPS and signed by Suzy  
19 Harris, legal specialist for ODE. LeClair Declaration, Exhibit 15.  
20 The subject of the letter is "Verification of Implementation of  
21 Final Order" in DP 04-110. The letter recites that ODE has  
22 "verified completion of all corrective action" ordered by ALJ Smith  
23 in DP 04-110.

24 The letter states that ALJ Smith ordered PPS to "offer the  
25 student 4000 minutes of compensatory education in math to be  
26 provided in the summer of 2005 or, if the parents and the District  
27

1 agree, at another time." Id. at 2. The letter continues:

2 The District offered compensatory education services in  
3 accordance with the final order. The District reasonably  
4 tried to accommodate the parent's preferences regarding  
5 scheduling these services during the summer of 2005, and  
6 made a reasonable offer to provide the services beginning  
no later than October 15, 2005. The parent did not accept  
these offers. The Department concludes that the District  
has satisfied the requirement to offer compensatory  
education services in math.

7 Id.

8 According to the affidavit of ODE defendant Harris, who signed the  
9 letter:

10 I also understand that when the ALJ awarded 4000  
11 compensatory minutes of services to plaintiff's son, she  
12 placed clear conditions on the award by requiring that  
13 the services be offered during the summer of 2005 unless  
the parties agreed otherwise. ... If the ALJ had not  
provided this timeframe for the compensatory services, it  
would have been impossible for ODE to monitor compliance  
of an open-ended award.

14 Based on the evidence in the record, ODE concluded that  
15 1) PPS had offered the compensatory services in the  
summer of 2005, but plaintiff had not accepted, 2) PPS  
16 and plaintiff had not come to an agreement by the end of  
the summer, but rather their negotiations had reached an  
impasse, and 3) PPS had made a further offer to provide  
17 services in October 2005 that the plaintiff had not  
accepted. ODE concluded that PPS was no longer obligated  
18 to provide the compensatory minutes because the summer  
had come to an end without the parties reaching an  
19 agreement. It appears to me that ODE's conclusion was  
consistent with the plain language of the ALJ's order,  
20 and any other conclusion would have gone beyond the plain  
language of the order, rendering the ALJ's conditions  
21 meaningless. Plaintiff never asked for modification or  
amendment of that order.

22 There is no admissible evidence in the record that PPS offered C.O.  
23 the 4000 minutes of compensatory education in the summer of 2005 or  
24 in the fall of 2005, or that Oman rejected such offers, as PPS's  
25 counsel admitted at oral argument. There is no evidence in the  
26 record to explain why the compensatory instruction was not provided  
27

1 to C.O. by Melvin-Smith Learning Center in the fall or winter of  
2 2005, as Oman requested.

3 ALJ Smith ordered that the services be provided in the summer  
4 of 2005 "or ... at another time." There is no deadline, of October  
5 15, 2005 or any other time, in the ALJ's order that C.O. be  
6 provided compensatory education. There is no evidence in the record  
7 that supports Harris's statement that it would be "impossible" for  
8 ODE to monitor compliance of the ALJ's award of the compensatory  
9 education and Harris offers no explanation for this statement.

10 The failure of PPS to comply with ALJ Smith's order that C.O.  
11 be offered compensatory math education, was conduct that a  
12 reasonable factfinder could conclude would likely deter Oman in the  
13 pursuit of her statutory rights under the IDEA. PPS's motion for  
14 summary judgment on the retaliation claim is denied.

15 **ODE Defendants' Motion for Summary Judgment**

16 ODE has not, like PPS, divided its argument by claims asserted  
17 in the two cases. For consistency, ODE's argument is divided into  
18 the two areas already discussed: Oman's "meaningful involvement"  
19 claims and Oman's retaliation claims.

20 I. "Meaningful involvement" claims

21 The heart of Oman's "denial of meaningful involvement" claim  
22 against the ODE defendants is the issue of whether she was provided  
23 adequate notice of the requirements for filing due process requests  
24 after IDEIA 2004. The state defendants assert two arguments against  
25 this claim, mootness and sovereign immunity.

26 ///

1           a.   Mootness

2           A case becomes moot when litigants' rights are no longer  
3 affected by the action which triggered the lawsuit. Mitchell v.  
4 Dupnik, 75 F.3d 517, 528 (9th Cir. 1996); Cammermeyer v. Perry, 97  
5 F.3d 1235 (9<sup>th</sup> Cir. 1996). See also American Rivers v. National  
6 Marine Fisheries Serv., 126 F.3d 1118, 1123 (9<sup>th</sup> Cir. 1997) ("If an  
7 event occurs that prevents the court from granting effective  
8 relief, the claim is moot and must be dismissed.") A party  
9 asserting that an issue is moot must demonstrate that there is no  
10 reasonable expectation that the violation will recur. County of Los  
11 Angeles v. Davis, 440 U.S. 625, 631 (1979).

12           The ODE defendants argue that Oman's claims are moot because  
13 ODE has "now properly adopted new Oregon Administrative Rules that  
14 comply with the IDEA 2004 amendments." The new Oregon  
15 administrative rules, according to the Harris affidavit, did not  
16 take effect until April 25, 2007. Oman's requests for due process  
17 hearings were dismissed on the basis of insufficiency in July 2005  
18 and June 2006. The promulgation of administrative rules in 2007  
19 does not remedy Oman's claim that she was denied her right to  
20 proper notification of her procedural rights in 2005 and 2006.

21           ODE has not directed the court to any statutory or regulatory  
22 authority requiring it to enforce the IDEIA 2004 due process  
23 notification requirements against Oman, even though her request for  
24 a hearing in DP 05-116 was dated June 28, 2005, *before* IDEIA 2004  
25 took effect. The state defendants contend that ODE was required to  
26 enforce IDEIA 2004 as of its effective date, July 1, 2005, despite

1 "potentially conflicting state regulations,"<sup>7</sup> because otherwise  
2 Oregon could have lost continued federal funding for its special  
3 education programs. The state defendants cite no evidence or legal  
4 authority to support this contention. ODE's leisurely process of  
5 adopting state administrative rules to implement IDEIA 2004--almost  
6 three years later--is inconsistent with a sense of urgency.

7 ODE also argues that it has now "taken steps to improve its  
8 notice to parents so that any previous inconsistencies about  
9 whether the old regulations applied or whether the IDEA 2004  
10 amendments applied have now been eliminated." State defendants'  
11 Memorandum, p. 4. This argument is based on the statements of  
12 Harris in her affidavit that the ODE issued a revised Notice of  
13 Procedural Safeguards in July 2005, based on IDEIA 2004 and another  
14 in October 2006, based on the newly promulgated federal  
15 regulations. As discussed, there is no evidence that Oman was ever  
16 provided with the July 2005 revised Notice; in fact, the evidence  
17 is that Oman wrote a letter to Harris and others requesting the  
18 Notice, only to be referred to Logerwell, who told her to make a  
19 request for production. In any event, Oman's 2006 due process  
20 request was dismissed on June 22, 2006, well before the ODE's  
21 October 2006 revision of the Notice. LeClair Declaration, Exhibit  
22 13.

23 ///

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24  
25 <sup>7</sup>The IDEA requires the Secretary of Education to provide a  
26 public comment period of at least 90 days on any regulation  
27 proposed under Subchapter I or Subchapter II of the IDEA.  
Subchapter II includes procedural safeguards. 20 U.S.C. §  
1406(a).

1 ODE asserts that "based on the proper adoption of new state  
2 regulations in conformance with the IDEA 2004 amendments and based  
3 on ODE's improvements to its Notice of Procedural Safeguards, the  
4 remedy plaintiff seeks in this lawsuit has already been obtained."  
5 State defendants' Memorandum, p. 5.

6 The evidence indicates that ODE never provided Oman with  
7 adequate notice of the procedural requirements for a due process  
8 notice that was in compliance with IDEIA 2004, either before or  
9 after Oman's June 28, 2005 request for a due process hearing was  
10 dismissed on July 20, 2005. The ODE's October 2006 revision of the  
11 procedural rules, even if provided to Oman, had no effect on the  
12 dismissal of Oman's two due process hearing requests, which  
13 occurred on July 20, 2005 and June 22, 2006.

14 ODE acknowledges that its notification procedures were, until  
15 at least October 2006, "inconsistent." This admission, in  
16 combination with the fact that there were no state administrative  
17 rules implementing IDEIA 2004 until April 2007, is fatal to the ODE  
18 defendants' contention that the passage of state administrative  
19 rules conferred a remedy on Oman for her claim that she was denied  
20 her statutory right to a due process hearing in 2005 and 2006.  
21 There is no evidence that ODE ever provided Oman with adequate  
22 procedural safeguard notices based on IDEIA 2004, and she never  
23 received the due process hearings she requested.

24 But even assuming that Oman has not received relief for her  
25 claim, this does not dispose of the ODE's mootness argument. While  
26 the passage of new state regulations had no effect on Oman's claims  
27

1 that were dismissed in DP 05-106 and DP 05-116, the promulgation of  
2 new regulations does make it highly unlikely that the dismissals  
3 would recur. Consequently, it is not clear to the court *how* ODE's  
4 violation of Oman's IDEA procedural rights can be remedied. Oman's  
5 son, C.O., is now over 19 years old and has graduated from high  
6 school. Under the IDEA, a state "may provide that, when a child  
7 with a disability reaches the age of majority \*\*\* [,] all other  
8 rights accorded to parents under this subchapter transfer to the  
9 child." 20 U.S.C. § 1415(m)(1). Oregon's administrative rules  
10 provide:

11       When a child with a disability reaches the age of  
12       majority under ORS 109.510 or 109.520, or is emancipated  
13       pursuant to ORS 419B.550 to 419B.558, the rights accorded  
14       to the child's parents under the special education laws  
15       transfer to the child.

16 OAR 581-015-0101(1).

17       Oman counters with evidence that ODE policies allow a student  
18 to transfer educational rights to the parent. See Transfer of  
19 Rights at Age of Majority, Exhibit 1, Plaintiff's Response to PPS  
20 Motion to Affirm. She also proffers a letter dated April 23, 2006  
21 to PPS signed by C.O., stating that he wishes Pat Oman to be  
22 appointed as surrogate parent to assert his special education  
23 rights. She argues that C.O.'s request was "granted by default"  
24 when PPS did not respond to the letter.

25       But Oman's status as C.O.'s surrogate parent for purposes of  
26 the IDEA does not resolve the question of how any substantive  
27 benefit could be obtained by C.O. or by Oman if the court ordered  
28 ODE to reconvene the due process hearings that were dismissed in

1 2005. I conclude that, because the court cannot grant effective  
2 relief on this claim, it should be dismissed as moot.

3 b. Sovereign immunity

4 The state defendants assert that sovereign immunity prevents  
5 Oman from claiming in federal court that ODE failed to provide her  
6 with adequate notification under the IDEA. The state defendants  
7 argue that to the extent Oman's claims are based on a "perceived  
8 failure" of ODE to "follow state regulations that may have  
9 conflicted with the IDEA 2004 amendments," her claims are based in  
10 state law, and must be brought in state court. State defendants'  
11 Memorandum, p. 7-8.

12 I disagree that Oman's claim is based on a perceived failure  
13 of ODE to follow state regulations that may have conflicted with  
14 IDEIA 2004. Rather, I interpret Oman's claim as one asserting that  
15 ODE failed to provide her with adequate notice of IDEIA 2004's new  
16 due process notification requirements before and after ODE ALJs  
17 dismissed her due process requests as insufficient under IDEIA  
18 2004. Such a claim has nothing to do with the state regulations in  
19 existence before April 2007 that may have conflicted with IDEIA  
20 2004.

21 Oman made it clear to ODE in her July 20, 2005 e-mail to  
22 Harris, Miller and Logerwell that she was requesting a copy of  
23 procedures that reflected the notification requirements contained  
24 in IDEIA 2004: "*I am not interested in the OLD procedures, which I*  
25 *already have, but in the new ones that implement the provisions of*  
26 *IDEIA.*" Oman Declaration, Exhibit 1 (emphasis added). Since Oman's  
27



1 request is for a procedural notice "that implement[s] the  
2 provisions of IDEIA," and not "the OLD procedures," her claim based  
3 on ODE's refusal to provide an IDEIA 2004 procedural notice has  
4 nothing to do with the preexisting "conflicting state regulations."  
5 The claim is not grounded in state law, and therefore is not barred  
6 by sovereign immunity.

7 Nor does Oman's claim even raise the issue of conflict,  
8 perceived or actual, between the federal 2004 IDEA regulations  
9 promulgated in October 2006 and state 2004 IDEIA regulations  
10 promulgated three years later in April 2007. Oman's claims are  
11 based on events that occurred before either the federal or the  
12 state administrative rules were promulgated. The state defendants'  
13 motion for summary judgment on the basis of sovereign immunity is  
14 denied.

## 15 II. Retaliation claims

16 Oman has alleged several bases for her retaliation claim  
17 against the state defendants: 1) ODE's refusal to investigate  
18 Oman's complaint that PPS required confidentiality agreements  
19 before reimbursing parents for IEEs; 2) ODE's failure to provide  
20 her with due process notification information relating to IDEIA  
21 2004; 3) ODE's dismissal of her two due process hearing requests on  
22 the basis of IDEIA 2004, even though neither federal, nor state  
23 regulations implementing those 2004 amendments had yet been  
24 promulgated; 4) ODE's ratification of PPS's refusal to provide  
25 C.O. with the 4000 minutes of compensatory math education awarded  
26 by ALJ Smith in 2004; and 5) ODE's refusal to produce the

1 administrative record in this case for over two years.

2 A. Refusal to investigate reimbursement complaint

3 ODE argues that the reimbursement issue is moot. I disagree.  
4 Although Oman acknowledges that she has been reimbursed for the  
5 IEE, without a confidentiality agreement, this does not dispose of  
6 the question of whether ODE's refusal to investigate Oman's  
7 complaint about reimbursement constituted retaliation: i.e.,  
8 whether ODE's refusal to investigate the complaint would have  
9 deterred a reasonable person from pursuing her rights under the  
10 IDEA.

11 ODE's stated reason for refusing to investigate the complaint  
12 was that Oman "provided no evidence whatsoever to show the  
13 existence of a systemic problem." ODE Memorandum, p. 10. ODE relies  
14 on Harris's affidavit:

15 I believe ODE appropriately declined plaintiff's request  
16 for an investigation into whether confidentiality  
17 agreements were being commonly used throughout the state  
18 by school districts because plaintiff provided no  
evidence whatsoever of the alleged practice other than  
her own experience with Portland Public Schools.

19 Harris Affidavit ¶ 14. ODE acknowledges that under 34 C.F.R. §  
20 300.662(b), a complaint must include both an allegation that a  
21 public agency has violated a provision of the IDEA and "[t]he facts  
22 upon which the statement is based." ODE points to nothing in the  
23 federal regulations which places on the complainant the burden of  
24 proving that the conduct complained of is "commonly used throughout

1 the state,"<sup>8</sup> or requires the complainant to provide evidence "other  
2 than her own experience." ODE provides no legal authority and  
3 articulates no facts explaining why it placed the burden on Oman of  
4 showing a "systemic" violation as a condition of investigating her  
5 complaint. A reasonable factfinder could conclude that ODE's  
6 conduct would have deterred a reasonable parent from pursuing her  
7 right to seek investigation of practices she believed violative of  
8 IDEA.

9 B. Failure to provide Oman with procedural safeguard notices  
10 consistent with IDEIA 2004

11 ODE has not proffered any evidence that it ever complied with  
12 Oman's requests for the due process notification requirements of  
13 IDEIA 2004, and has not cited the court to any authority supporting  
14 its failure to provide Oman with a notice of procedural safeguards  
15 consistent with IDEIA 2004. ODE acknowledges that the state  
16 regulations in place at the time Oman made her due process requests  
17 were "inconsistent" with IDEIA 2004. The absence of any legal  
18 justification for its failure to provide Oman with a notice of  
19 procedural safeguards consistent with IDEIA 2004, along with ODE's  
20 dismissal of two due process requests on the ground of IDEIA 2004  
21 insufficiencies, enable a reasonable factfinder to conclude that  
22 ODE's conduct reasonably deterred Pat Oman from pursuing her

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23 <sup>8</sup> If ODE's proposed standard were to apply, it is difficult  
24 for the court to imagine how the parent of a child in the  
25 Portland school district could prove that the practice in the  
26 Portland school district is "commonly used throughout the state."  
27 Moreover, such a standard would suggest a parent not subject to  
28 such a practice in his or her own district could nonetheless  
force ODE to investigate commonly used practices in other  
districts.

1 statutory right to due process hearings.

2 C. ODE's ratification of PPS's refusal to provide C.O. with  
3 compensatory math education

4 ODE ratified PPS's refusal to provide C.O. with the 4,000  
5 minutes of compensatory math instruction ordered by ALJ Smith. No  
6 evidence in the record supports ODE's findings in support of its  
7 ratification. There is no evidence that PPS "offered compensatory  
8 education services in accordance with the final order," as ODE  
9 found. Declaration of Sarah LeClair, Exhibit 15. There is no  
10 evidence that PPS "reasonably tried to accommodate the parent's  
11 preference regarding scheduling these services during the summer of  
12 2005," as ODE found. Id. There is no evidence that PPS "made a  
13 reasonable offer to provide the services beginning no later than  
14 October 15, 2005," as ODE found. Id. There is no evidence that Pat  
15 Oman failed to "accept these offers," as ODE found. Id. Harris's  
16 explanation that it would have been impossible for ODE to monitor  
17 compliance of an "open-ended award," is illogical because ALJ  
18 Smith's award was open-ended. There is no evidence in the record  
19 that explains why it would have been "impossible" for ODE to  
20 monitor ALJ Smith's award. Indeed, simply counting the hours as  
21 they were provided would have sufficed.

22 In the absence of any factual, legal or logical explanation  
23 for ODE's ratification of PPS's refusal to comply with ALJ Smith's  
24 order, a reasonable factfinder could conclude that ODE's findings  
25 had the effect of deterring Oman from further pursuing her son's  
26 right to the compensatory education.

27 ///

1           D.   Refusal to file administrative record

2           Oman contends that the state defendants retaliated against her  
3 by delaying for two years her request that the administrative  
4 record for DP 04-110 be filed with the court. The state defendants  
5 rely on the affidavit of Harris, a lawyer, who states, "Any delay  
6 that may have occurred in producing the administrative record  
7 occurred only because of the complicated and confusing nature of  
8 this lawsuit."

9           The complaint in No. 05-1715 alleges that on or about July 18,  
10 2005, Oman requested that ODE send the administrative record for DP  
11 04-110 to this court. Complaint ¶ 33. Oman alleges further that by  
12 letter dated October 28, 2005, Harris informed Oman that ODE had  
13 determined that No. 05-558 was not an appeal of DP 04-110 because  
14 "[y]ou request a jury trial, which is not provided for under the  
15 IDEA. You request damages which, in the Ninth Circuit, are not  
16 available under the IDEA.'" Id.; Exhibit 1 to Complaint (letter  
17 dated October 28, 2005 from Suzy Harris to Pat Oman). The letter  
18 continues, "After reviewing your complaint and amended complaint,  
19 the Department does not find any basis for concluding that your  
20 complaint is an appeal of your due process hearing decision." Id.

21           Oman alleged in her complaint that in refusing to forward the  
22 record, Harris was in violation of 34 C.F.R. § 300.512. That  
23 regulation provides that the reviewing court "[s]hall receive the  
24 records of the administrative proceedings." 34 C.F.R. §  
25 300.512(b)(1).

26       ///

1 Harris's assertion in the letter to Oman that the ODE was  
2 relieved of any obligation to produce the administrative record  
3 because Oman, a non-lawyer representing herself, had requested a  
4 jury trial or damages is without legal justification. Consequently,  
5 a reasonable factfinder could conclude that ODE's refusal to  
6 provide the administrative record would reasonably deter Oman from  
7 pursuing her claims in this court.

8 The state defendants' motion for summary judgment on Oman's  
9 retaliation claim is denied.

10 **Motion for Reconsideration of Previous Rulings,**

11 **Motions to Affirm Prior Decisions**

12 Oman has filed a motion for reconsideration of the court's  
13 previous rulings, in light of the Supreme Court's decision in  
14 Winkelman v. Parma City School District, \_\_ U.S. \_\_, 127 S.Ct. 1994  
15 (2007). The defendants have filed motions to affirm the court's  
16 pre-Winkelman decisions.

17 In Winkelman, the Supreme Court held that the IDEA grants  
18 parents independent, enforceable rights, not only to certain  
19 procedural and reimbursement-related matters, but also to a FAPE  
20 for the parent's child. The issue presented by Winkelman in this  
21 case is whether any of the claims asserted in these cases,  
22 previously dismissed or not, is one by which the parent, Pat Oman,  
23 seeks to vindicate her own right to a FAPE for her child or,  
24 rather, whether the claims she asserted were limited to her own  
25 procedural rights under the IDEA and the rights of her son only to  
26 a FAPE. If the former, then Winkelman changes the posture of this  
27

1 case; if the latter, then Winkelman has no effect.

2 The court has reviewed the pleadings, its previous decisions,  
3 the parties' briefs, and the Winkelman decision and concluded that  
4 the present action contains three issues not directly affected by  
5 the Court's holding in Winkelman. The first is Oman's request for  
6 judicial review of the due process hearings conducted by ODE, with  
7 respect to procedural issues. The second is Oman's claim that  
8 defendants hindered her exercise of IDEA procedural rights,  
9 including participation in her son's IEPs, receipt of written  
10 notices, access to C.O.'s educational records, reimbursement for an  
11 IEE, contact with PPS witnesses before a due process hearing,  
12 adequate procedural safeguard notices, and the provision of due  
13 process hearings. The third is retaliation. None of these claims  
14 can be construed as one asserting Pat Oman's right to a FAPE for  
15 her son.

16 The court's December 22, 2005 order dismissed the IDEA claims  
17 brought by C.O. on the ground that parents cannot represent their  
18 minor children in IDEA civil actions. In Winkelman, the Court  
19 expressly declined to reach this issue. Although the parents in  
20 Winkelman brought the action *pro se*, the Court ruled that because  
21 parents enjoy an independent right to their child's FAPE under the  
22 IDEA, they are entitled to litigate their own IDEA claims. Thus,  
23 the Court found that it "need not reach petitioners' alternative  
24 argument, which concerns whether the IDEA entitles parents to  
25 litigate their child's claims *pro se*." 127 S.Ct. at 2007.

26 Accordingly, Oman's motion for reconsideration of previous  
27

1 rulings is denied; the state defendants' motion to affirm this  
2 court's pre-Winkelman decisions is granted, and the PPS defendants'  
3 motion to affirm prior decisions is granted.

4 **Conclusion**

5 The PPS defendants' motion for summary judgment (doc. # 96) is  
6 GRANTED in part and DENIED in part. The state defendants' motion  
7 for summary judgment (doc. # 105) is GRANTED in part and DENIED in  
8 part. Plaintiff's motion for reconsideration of previous rulings  
9 (doc. # 127) is DENIED. The PPS defendants' motion to affirm prior  
10 decisions (doc. # 123) is GRANTED. The state defendants' motion to  
11 affirm the court's pre-Winkelman decisions (doc. # 121) is GRANTED.

12 IT IS SO ORDERED.

13  
14  
15 Dated this 10<sup>th</sup> day of September, 2005.

16  
17 /s/ Dennis James Hubel

18 Dennis James Hubel  
19 United States Magistrate Judge  
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